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82-448

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

CREATIVE ENVIRONMENTS, INC., ET AL.,
PETITIONERS,

v.

ROBERT R. ESTABROOK, ET AL.,
RESPONDENTS.

On Writ Of Certiorari To The United States Court of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED FOR REVIEW

1. Under what circumstances do repeated intentional violations of state law rise to the level of a constitutional violation for which there is a cause of action under 28 U.S.C. § 1983?

2. Does the availability of a state remedy cure an intentional deprivation of property without due process of law?

3. What analysis must be undertaken to determine whether a state remedy is adequate to cure a prior deprivation of property without due process?

4. Where a developer alleges that town approval of a subdivision plan was denied for subjective political and social reasons, is it required to "prove" that such motives were the "sole or major" reasons for disapproval in order to survive a motion for summary judgment?

5. Do a developer and an intended homeowner in a subdivision for which a plan has been submitted to local authorities for approval have standing to raise the First Amendment rights of the homeowners of the planned subdivision?

PARTIES

Petitioners are Creative Environments, Inc., a Massachusetts corporation and Wayne E. Barber, an individual who is president of the corporation. Respondents include appointed and elected officials of the Town of Bolton, Massachusetts[1], Environmental Research Technology, Inc. and its employee Scott McCandless, and the Town of Bolton, which was added as a party by amendment subsequent to the original entry of the action.

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[1] Robert R. Estabrook, Robert P. Fischer, Gordon E. Slater, Ronald G. Kelley, Berneda A. Serfass, Pierino A. Bonazzoli, Robert N. Mechlin, Francis G. Mentzer, Jr., Waldo G. Henry, Arthur S. Hill, Robert J. Held, Warren K. Colby, Wayne D. Wentzel, Jr., Richard W. Sullivan, Walter H. Phillips, Eric F. Salmela, and Bonnie Potter. Original defendants Thomas Murphy and Robert G. Horton are now deceased.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Creative Environments, Inc. and Wayne E. Barber (together collectively referred to herein as "CEI" or "Petitioners") respectfully pray that a writ of certiorari issue to review the opinion, order and judgment of the United States Court of Appeals for the First Circuit in this case.

Opinions Below

The opinion of the First Circuit Court of Appeals is not yet reported. It is reproduced herein as Appendix A. The opinion of the District Court allowing the motions for summary judgment filed by all of the Respondents except the Town of Bolton is officially reported at 491 F. Supp. 547 (D.C. Mass. 1980). The opinion of the District Court allowing the Town's separately filed motion for summary judgment is unreported and is reproduced herein as Appendix B.

Jurisdiction

The decision of the United States Court of Appeals for the First Circuit was rendered on May 6, 1982. Petition for rehearing was denied on June 15, 1982. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

U.S. CONST. AMEND. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASS. GEN. LAWS ANN., CH. 41, § 81M.

§ 81M. Legislative Statement of Purpose.

The subdivision control law has been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of the cities and towns in which it is, or may hereafter be, put in effect by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas. The powers of a planning board and of a board of appeal under the subdivision control law shall be exercised with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; for insuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provision for water, sewerage, drainage, underground utility services, fire, police, and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; and for coordinating the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the ways in neighboring subdivisions. It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if said plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions of land; provided, however, that such board may, when appropriate, waive, as provided for in section eighty-one R, such portions of the rules and regulations as is deemed advisable. (1953, 674; 1957, 285; 1969, 884, § 2.)

MASS. GEN. LAWS ANN., ch. 41, § 81BB

§ 81BB. Same Subject; Appeals, Costs, etc.

Any person, whether or not a party to the proceedings, aggrieved by a decision of a board of appeals under section eighty-one Y, or by any decision of a planning board concerning a plan of a subdivision, or by the failure of such a board to take final action concerning such a plan within the required time, or any municipal officer or board, may appeal to the superior court sitting in equity for the county in which the land concerned is situated; provided, that such appeal is entered within twenty days after such decision has been recorded in the office of the city of town clerk or within twenty days after the expiration of the required time as aforesaid, as the case may be, and notice of such appeal is given to such city or town clerk so as to be received within such twenty days. The court shall hear all pertinent evidence and determine the facts, and upon the facts so determined, shall annul such decision if found to exceed the authority of such board, or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, but the parties shall have the rights of appeal and exceptions as in other equity cases.

A city or town may provide any municipal officer or board with legal counsel for appealing, as provided in this section, a decision of a board of appeals or a planning board and for taking such other subsequent action as parties in other equity cases are permitted to take.

Costs shall not be allowed against the planning board or board of appeals unless it shall appear that such board acted with gross negligence or in bad faith.

All issues in any proceeding under this section may be advanced for speedy trial over other civil actions and proceedings. (1936, 211, § 4; 1947, 340, § 4; 1953, 674, § 7; 1955, 348; 1957, 199, § 2.)

RULES AND REGULATIONS GOVERNING THE SUBDIVISION OF LAND, BOLTON MASSACHUSETTS

3.3 Definitive Plan

3.3.3.1 Submission

Any person who submits a definitive plan of a subdivision to the Planning Board for approval shall file with the Board the following:

. . .

3.3.1.28

Environmental and Financial Impact Studies endorsed by a Professional Planning Engineer which demonstrates that all available alternatives have been explored and evidence is provided that the plans submitted represent the best interest of the Town.

Statement of the Case

Petitioner Creative Environments, Inc. became the owner in 1973 of a 183 acre parcel of land in the Town of Bolton ("Town") known as Appleton Ridge. Seeking subdivision approval, CEI filed a preliminary plan with the Town on December 4, 1973, in accordance with Massachusetts Law.

The plan proposed an 84 unit housing subdivision for Appleton Ridge. The homes were to be arranged in four-home "clusters", each cluster to be surrounded by a large area of open wooded space and sharing common services. The cluster concept was at the heart of the Appleton Ridge subdivision plan.

To satisfy the Town zoning requirement that individual single family homes be built on separate lots of at least 1.5 acres, CEI drew the lot lines around each home in an unconventional, irregular shape. This complied with the Town zoning requirements which had no express sideline specifications over and above the 1.5 acre requirement. CEI also

planned other common facilities for use by the entire subdivision; all common facilities were to be managed by the subdivision's homeowners association. Each homeowner would own an interest in common facilities and automatically become a member of the homeowners association.

The proposed subdivision would, by its size alone, have a substantial impact on the Town. According to census data, Bolton had a 1980 population of only 2,530. Moreover, the mandatory homeowners association presented at least the possibility of the creation of a new, cohesive political force in the Town. Whether or not this would have been the case, the record below presents sufficient evidence[3] to support a finding that the social and political impact of the subdivision on the Town was a motivating factor in the minds of those Town officials and independent consultants who took part in the consideration, and ultimate denial, of the Appleton Ridge subdivision plan.

The Town Planning Board ("Board") denied approval of the preliminary plan, for reasons which included a statement that the irregular lot lines were "not in compliance with the intent of the town by-laws". As was its right, CEI proceeded to file a definitive subdivision plan which the Board was required to approve so long as it complied with the Town zoning by-laws and the Board's own reasonable rules and regulations. Mass. Gen. Laws Ann. ch. 41, § 81M. Board Regulation 3.3.1.28, in

[3] The evidence included statements by a number of the respondents. For example, at a meeting of the Town Planning Board on March 18, 1974, Board member Murphy stated "that the organization of homeowners would be such that they could control the Town Meeting and that he was terribly concerned about the effect of a small town government with such a situation." A topic of discussion at one of the Board's secret meetings on September 18, 1974, only eight days prior to disapproval of CEI's plan, was the "social impact on the Town". Moreover, CEI presented evidence that the purported grounds for disapproval on September 26, 1974 were not the real bases for the decision. See discussion of September 26, 1974 written decision below.

existence at the time CEI filed (and continuing in effect throughout the time of the matters discussed herein) required developers to file with the Board, as a condition for approval, an environmental and financial impact study demonstrating that "the plans submitted represent the best interest of the Town." Nothing in the regulation provides any criteria or factors to be considered in determining what is in the best interest of the town. In an attempt to comply with the regulation, CEI submitted a 33 page study.

Although one public hearing and several meetings with CEI were held, the Board also met on a number of other occasions in secret, without notifying the public (or CEI) and without complying with state law provisions for the holding of executive sessions. These "unofficial" meetings included at least one meeting in which the Board invited all "major town boards and officials...to bring with them comments, questions, and information pertinent to CEI's definitive plan." Although there are no minutes (a further violation of state law) and few notes of these meetings, those that exist indicate that Regulation 3.3.1.28 and the social and political impact of the subdivision on the Town were frequent topics of discussion.

The Board hired consultants to evaluate CEI's proposal. Environmental Research Technology, Inc. ("ERT") was retained through the intercession of Scott McCandless ("McCandless") (an active Town resident who opposed the Appleton Ridge plan) to evaluate the environmental and financial impact statement submitted under Regulation 3.3.1.28. Boston Survey Consultants (BSC), a corporation providing professional engineering services, was retained to evaluate the plan itself. Both consultants rendered reports to the Board which were used (as discussed below) in preparing its final written decision denying approval for the subdivision plan. Despite repeated requests, CEI was denied copies of the reports. Nor

were the contents of the reports revealed to CEI, at public hearing or otherwise, prior to the Board's disapproval of the plan.[3]

The Board voted to disapprove the definitive plan on September 25, 1974. Thereafter, the Board received Town counsel Arthur Hill's written opinion that Regulation 3.3.1.28 could not legally be used as grounds for denial of the subdivision plan. In its written decision dated the following day, September 26, the Board listed verbatim, as grounds for disapproval, seven items that BSC in its report suggested as "minor conditions" which they recommended be attached to approval of the plan.[4] At the close of its decision, despite Town counsel's opinion, the Board added in a separate paragraph that it considered CEI's environmental impact study, submitted under Regulation 3.3.1.28, "unacceptable". Although the Board voted not to cite Regulation 3.3.1.28 as an express ground for disapproval, it did not otherwise explain the relevance of this last paragraph to its decision.[5]

In order to protect its right to seek review of the decision, CEI filed an appeal under Mass. Gen. Laws Ann. ch. 41, § 81BB. While the appeal was pending, the parties continued their discussions which soon focused, not on the reasons expressly given for denial of the plan (these "minor" problems

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[3] Indeed, both reports are dated after the date of the only public hearing; ERT was not even retained until September 12, 1974, four days after the public hearing.

[4] CEI points to the Board's refusal to provide the BSC report (thereby preventing CEI from curing the "minor" problems noted therein), the verbatim quoting from the BSC report (evidencing the Board's lack of input and interest in these technical items) and the Board's failure to indicate the particular Town regulation which it claims was violated in each instance as required by state law as further evidence that the items listed were only a pretext, not the Board's real reasons for denying approval.

[5] The unexplained inclusion of this statement is yet further evidence that Town officials' subjective fears were factors underlying their decision, having been considered under the guise of Regulation 3.3.1.28.

having been quickly resolved[8]) but on the newly raised issue of a grant of open space to the Town. During the spring and summer prior to disapproval, several meetings took place between Robert Held, chairman of the Conservation Commission of the Town, and CEI. Held demanded, as a condition for Conservation Commission approval, that CEI grant a substantial amount of land in the subdivision to the Town free of charge, in perpetuity. CEI agreed to make such a grant, provided its definitive plan was approved substantially as submitted, with the waivers requested therein.

On December 5, 1975, as part of the post-decision discussions, CEI submitted a revised plan which reflected the open-space agreement with the Conservation Commission. On January 30, 1975, the Board voted to conditionally accept the December 5 plan, adding several new conditions, and withholding a number of requested waivers. As a result, CEI withdrew its offer to grant the open space in perpetuity, and instead reduced the term of the grant to three years, the maximum term which the Board could unilaterally demand under state law. Mass. Gen. Laws Ann. ch. 41, § 81Q.

On March 20, 1975, the Board again conditionally approved the CEI plan, adding still further conditions including, though not limited to, the grant in perpetuity of open space that CEI had previously withdrawn. CEI immediately brought the March 20 approval conditions to the attention of the state court. All other stated conditions and the seven express reasons for the September 26, 1974 decision having been resolved by the parties, the trial focused upon the issue of whether the Board could, under state law, condition approval of the plan on the granting of open space in perpetuity. The state court remanded the case to the Town Board, ordering

[8] Although as late as January 1975, Board member Kelley asserted that applicants were still required to show that their plans represented the best interest of the Town under Regulation 3.3.1.28 as a condition for approval. This and later efforts of the Board show that the Town had not abandoned Regulation 3.3.1.28 as a vehicle for defeating the Appleton Ridge plan.

CEI to submit a new open space plan and ordering the Board to take definitive action on the plan. In compliance, CEI filed a plan with the Board showing the open space it proposed to grant to the Town.

Thereafter, the Board met twice in "executive session", resulting in a June 16, 1975 resolution. This resolution was passed without any public hearing, without prior notice to CEI, and without providing CEI an opportunity to be heard on the issue. It totally ignored the new open space plan already filed by CEI and instead required CEI to submit an entirely new subdivision plan, forcing it to start the entire subdivision approval process over again from the beginning, and thereby subjecting CEI to all Town by-laws and regulations enacted after the filing of CEI's original plan. Not surprisingly, the Town had, in the interim, enacted a by-law which outlawed the irregular lot lines used by CEI in its plan, and thereby defeated the "cluster" concept which was at the heart of the Appleton Ridge subdivision plan. Soon thereafter, the Board raised the filing fee, increasing the amount CEI would have to pay from $75.00 to $19,000.00. Of that, approximately $13,000.00 was to be used to finance the review of studies submitted under Regulation 3.3.1.28. Presumably, CEI would have to once again attempt to comply with the regulation.

Through this one stroke, the Town has successfully defeated CEI. It did so in a manner that was arguably not appealable under state law, since it was not a decision on a particular subdivision plan. Indeed, when CEI attempted to bring the issue to the attention of the court, it was informed that the court had no longer retained jurisdiction of the matter. On the other hand, had it elected to file a new subdivision plan and start the whole subdivision approval process over again, CEI would automatically have lost its protection from the newly enacted by-laws.

CEI thereupon filed an action in the United States District Court for the District of Massachusetts alleging that Town officials, together with ERT and McCandless, had conspired to

deprive it of its constitutionally protected rights. Following this Court's decision in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) the Town was added as a party.

The District Court entered summary judgment in favor of the Respondents, other than the Town, on June 17, 1980. On November 20, 1980, the District Court entered summary judgment for the Town in response to its separately filed motion. Final judgment was entered on June 2, 1981. The District Court's decision was affirmed by the Court of Appeals for the First Circuit on May 6, 1982 on the following grounds[7]:

1. Assuming that the Respondents' actions deprived Petitioners of their rights as defined by state law, the record presented insufficient evidence to support Petitioner's claims that they had been deprived of property without due process;
2. The record presented insufficient evidence to "prove" that Regulation 3.3.1.28 (and the illegal factors it permitted the Town to consider) were the "sole or major" grounds for disapproval;
3. Petitioners had no standing to raise the First Amendment rights of homeowners in the proposed subdivision.

Petitioner's Petition for Rehearing was denied on June 15, 1982.

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[7] Both courts also made rulings disposing of Petitioner's claims under 28 U.S.C. §§ 1985 and 1986. Petitioner does not seek a writ a certiorari with respect to these rulings.

Reasons for Granting the Writ

I. A Writ Of Certiorari Is Needed To Resolve Important Issues Surrounding The Definition Of Constitutionally Protected Rights

A. *Recent Decisions of This Court Leave Unresolved the Issue of When Post-Deprivation Remedies Cure Unconstitutional Deprivations of Property*

In Board of *Regents* v. *Roth*, 408 U.S. 564, 577 (1971) this Court held that constitutionally protected property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules of understandings that secure certain benefits and that support claims of entitlement to those benefits." In Massachusetts, applicants who have filed subdivision plans are entitled to local approval, provided the plans meet the reasonable rules and regulations of the town. Mass. Gen. Laws Ann. ch. 41, § 81M. Massachusetts has also enacted laws designed to prevent towns from subjecting an applicant to ex post facto rules and regulations, Mass. Gen. Laws Ann., ch. 40A, § 7A, the taking of an applicants' property without compensation as a condition for approval, Mass. Gen. Laws Ann., ch. 41, § 81Q, and the consideration of evidence against the applicant without his knowledge, whether at secret meetings, Mass. Gen. Laws Ann., ch. 39, § 23A, or through consideration of documents which have not been made available to the applicant, Mass. Gen. Laws Ann., ch. 66, § 10. Petitioners have alleged that Respondents engaged in an intentional scheme to deprive them of their rights as defined by state law and designed in such a manner as to insure the failure of state remedies. Assuming without deciding that Respondents in fact committed the numerous violations of state law alleged by Petitioners, the First Circuit ruled that

these violations did not rise to the level of violations of federally protected rights. Its rulings raise important constitutional issues which should be decided by this Court.

Recent decisions of this Court defining constitutionally protected rights leave unresolved an important issue raised by the ruling of the First Circuit. This open issue can best be illustrated by a comparison of *Parratt* v. *Taylor*, 451 U.S. 527 (1981) with *Patsy* v. *Board of Regents of State of Fla.*, ____ U.S. ____, 102 S.Ct. 2557 (1982). In *Parratt*, this Court held that the provision of post-deprivation tort remedies by the State of Nebraska satisfied constitutional due process requirements where the deprivation of property took place as a result of the negligence of state officials. It does not necessarily follow, however, that the provision of adequate post-deprivation remedies satisfies due process requirements in all instances. Justice Blackmun, in his concurring opinion in *Parratt* states: "...[I] do not understand the Court to suggest that the provision of 'post-deprivation remedies,'...within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property." 451 U.S. at 545.

In *Patsy*, the lower court examined the state remedies available to the Petitioner there in great detail, concluded they were adequate, and required the petitioner to exhaust these remedies prior to filing an action under § 1983. While this Court, in its opinion in *Patsy*, discussed only the question of whether exhaustion is required under § 1983, the decision also contains an implicit ruling on the issue left open in *Parratt*. If an adequate remedy under State law cures all deprivations of due process, then there would have been no need in *Patsy* (or any other case) to discuss whether Patsy was required to exhaust that adequate remedy under state law. *Patsy*, therefore, seems to present one type of case where the presence of an adequate state remedy is not sufficient.

At least one lower court has struggled to define the type of deprivation which can be cured by an adequate state remedy. In *Bonner* v. *Coughlin*, 517 F.2d 1311 (7th Cir. 1971), modified en banc, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) dealing with facts analogous to *Parratt* and decided prior to the *Parratt* decision, the Court suggests that there is a difference between a challenge to an established state procedure, and a property damage claim arising out of the misconduct of state officials. 517 F.2d at 1319. In *Patsy*, however, no established state procedure was challenged, suggesting that this is not the controlling distinction.

The First Circuit in its decision below, resolves the issue by applying an entirely new—and Petitioner would argue incorrect—standard. Disposing of the issue in a footnote (A. 19-20, fn.9) the First Circuit ruled that an adequate state remedy satisfied due process requirements unless the case involves "gross abuse of power, invidious discrimination or fundamentally unfair procedures." This is far more demanding than the standard suggested by Justice Blackmun in his concurring opinion in *Parratt*. A writ of certiorari is needed to resolve the conflict and clarify this important issue for the lower courts.

B. *What Standard Should Be Used to Determine the Adequacy of State Remedies to Cure Intentional Deprivations of Property*

Assuming that the First Circuit was correct in ruling that an adequate state remedy may cure intentional deprivations of property by state officials, its assessment of state remedies is cursory and totally inadequate. The lower court apparently assumes (A. 19-20, fn.9), without analysis, that the existence of a constitutional state statutory scheme for appealing from denial of a subdivision plan is automatically sufficient to remedy the intentional actions of state officials. An examination of relevant portions of the Massachusetts Subdivision Control Law, Mass. Gen. Laws Ann., ch. 41, § 81BB illustrates a

detailed, admittedly constitutional statutory scheme for appeals from decisions of local planning boards, which nevertheless is totally inadequate to remedy the particular intentional actions of the local officials in this case.

1. A § 81BB appeal is limited to the issue of whether the plan submitted complies with applicable laws, rules and regulations. The applicant cannot raise the issues included by Petitioners in this litigation: intentional scheme to deprive Petitioners of their right to approval, use of unconstitutionally vague regulation, denial on the basis of unconstitutional political and social concerns.

2. Under a § 81BB appeal, the court has no power to award compensatory money damages. Where, as here, local officials' intentional obstructions placed in the path of approval so delayed construction of the subdivision that it no longer was feasible, the right to ultimate approval of the original plan was of no use and does not serve to recompense an applicant for the real losses incurred as a result of the officials' unconstitutional acts.

3. In this particular case, Petitioners initially sought the limited state remedies which were available. Having obtained a remand from the State court, Petitioners were denied the approval to which they were entitled by Respondents, who insisted Petitioners file an entirely new plan and start the process all over again, subject to all the new regulations that had been enacted in the interim. Denied review by the state court at this juncture, and faced with the possibility that compliance with the Board's insistence on a new plan would be deemed an election to start all over again, CEI had no place to turn but to the federal courts for relief. Few state remedial schemes are adequate in the face of such a determined effort to deprive a person of his state defined rights.

The First Circuit premises its ruling that due process has been provided on the existence of a state remedial scheme without examining that scheme to determine whether it does

in fact serve to remedy the particular unconstitutional deprivations which are claimed to have occurred. A writ of certiorari should be granted in order to guide the lower courts in the type of analysis necessary to assess the adequacy of a state remedial scheme where that adequacy is relied upon to cure unconstitutional deprivations of property.

C. *Must Deprivations of Property Without Due Process Be "Egregious" In Order to Warrant Constitutional Protection?*

Aside from its cursory discussion of the availability and adequacy of state remedies, the First Circuit also appears to base its decision on the ruling that the facts in this case are simply not sufficiently "egregious" (A. 19) or out of the ordinary to warrant the attention of the federal courts. Petitioners are aware of no such additional requirements under the Constitution or the decisions of this Court. The writ should be granted in order to correct this erroneous precedent on a crucial constitutional issue.

II. The Decision Of The First Circuit Is In Direct Conflict With The Prior Decision Of This Court In *Village Of Arlington Heights* v. *Metropolitan Housing Development Corp.*

A. *In Ruling On the Motivation Behind the Written Decisions of Town Officials, the First Circuit Applies a Standard Which Directly Conflicts with a Prior Decision of This Court.*

Petitioner presented evidence below that the Board's September 26, 1974 decision was based upon Town Regulation 3.3.1.28, which required an applicant to submit an en-

vironmental and financial study showing that the proposed development was in the "best interest of the Town". The First Circuit expressly declined to decide whether this regulation was constitutionally infirm for lack of standards, ruling that "plaintiffs have not established any likelihood of showing that Regulation 3.3.1.28 played [a sole or major] role..." in the denial of the plan. (A. 16)

This ruling is in direct conflict with this Court's decision in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) where the Court held that a plaintiff is not required "to prove the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." It is even more difficult to provide such proof in opposition to a motion for summary judgment, prior to trial and the opportunity to cross-examine. Yet this is precisely the standard applied to Petitioners by the First Circuit. A writ should be granted to correct this conflicting and erroneous ruling.

B. *The First Circuit's Ruling That Petitioners Lacked Standing to Assert First Amendment Rights Directly Conflicts With the Prior Decision of This Court*

Petitioner presented evidence below that Town officials' sustained efforts to defeat the subdivision plan were motivated by concern over the creation of "a political clique" and that "[c]ommon land ownership could foster a viable political group in a town such as Bolton." (Quoted from ERT's evaluation of Petitioner's environmental study filed in its attempt to comply with Regulation 3.3.1.28). Petitioners assert that denial of the plan for political and social reasons constitutes

a violation of the homeowners' right to free association under the First Amendment of the Constitution of the United States.

The First Circuit disposes of this issue (A. 23, fn.12) by ruling that Petitioners have no standing to raise such claims. The facts of this case fall squarely within the holding of this Court in *Village of Arlington Heights* v. *Metropolitan Housing Corp., supra*. Petitioners here include the corporation, which had invested money in the project, submitted plans to local authorities, and had its project stopped by the actions of local officials as complained of herein. In addition, Petitioner Wayne Barber has stated his intent to become a homeowner in the particular subdivision (and thereby automatically an owner with an interest in common areas, and a member of the homeowner's association). This is not a "generalized grievance...it focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court." 429 U.S. at 264. Petitioners have thus presented evidence of the likelihood of their membership in a group which was prevented from coming into existence by the actions of Respondents. The fact that the political and social threat posed by such a group may have been only perceived, rather than actual, does not in any way lessen the impact on intended members of the group, or deprive them of standing. The writ should accordingly be granted to correct this erroneous and conflicting ruling of the First Circuit on an important recurring issue.

Conclusion

This case presents a number of issues in an important and evolving area of constitutional law, defining the boundaries between violations of constitutional rights and mere violations of state law. In an apparent effort to discourage "disgruntled developers" from filing suit in federal court, the First Circuit makes rulings which directly conflict with previous decisions

of this Court, disposes of important constitutional issues in footnotes, and overlooks evidence despite the posture of the case, on appeal from the allowance of a motion for summary judgment. Such rulings will not serve to "stem the tide" of cases filed under 28 U.S.C. § 1983. This Court's guidance is needed to set clear and non-conflicting standards defining the elements necessary to maintain a cause of action under 28 U.S.C. § 1983. For these reasons, Petitioners request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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